

TINA A. BLAIR)	
Claimant)	
VS.)	
)	Docket No. 1,042,324
FLYING J, INC.)	
Respondent)	
AND)	
)	
ZURICH AMERICAN INSURANCE CO.)	
Insurance Carrier)	

The only issue on this appeal is whether claimant injured her back at work in an accident that arose out of and in the course of her employment with respondent.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date, the undersigned Board Member finds:

Claimant has worked for respondent for more than three and a half years. On September 4, 2008, claimant's job duties as a merchandiser required her to take 20 to 30 pairs of plastic shoes from an approximate four- by five-foot section of pegboard, place the shoes in a box or tote, and then slide the tote to the end of the aisle. Once the shoes were moved, claimant installed two four-foot sections of shelving, which she had obtained from behind the store and readied for displaying dolls.

Claimant obtained several large boxes of dolls from a storage area at the rear of the store. Claimant stacked the boxes, which she then slid down the hallway to the sales floor. She then unpacked the boxes and placed the dolls on the shelves. Removing the shoes and displaying the dolls required three or four hours during which claimant was repetitively bending.

Claimant completed the project after lunch. She testified, however, that her low back began getting sore before lunch. What is more, claimant testified that around lunchtime she first mentioned her back symptoms to Linda Bethmann, respondent's general manager. Later, claimant allegedly spoke with Ms. Bethmann again and this time claimant allegedly said there was something really wrong with her back. Claimant testified, in part:

Q. (Mr. Collignon) . . . Did you mention to anybody that you were having soreness?

A. (Claimant) Linda.

Q. And that was around the time of lunch?

A. Yes.

Q. And what did you tell Linda?

A. I just told her that I felt like I was getting sore and didn't know what was going on.

Q. What did she tell you at that time?

A. She didn't really respond to me. She just kind of brushed it off.

Q. Okay.

A. It was after lunch I talked to her and told her that I think something's really wrong and she instructed me to go to a chiropractor.

Q. Okay. What do you recall about that conversation?

A. I don't know the full conversation, I just -- I remember telling her after speaking to somebody else, I don't remember who, I just -- they had told me that I needed to tell Linda, and I told Linda that I really felt that something's wrong, could be wrong, and she just instructed me to go to the chiropractor.¹

Claimant also recalls a lunchroom conversation on September 4, 2008, with co-worker Karen Alvarado. Ms. Alvarado allegedly asked claimant what was wrong and claimant responded that she was hurting.

After stocking the dolls, claimant cleaned up her mess, returned the extra dolls to the stockroom, and began stocking other items onto the store's shelves. When claimant left work that evening her back was sore.

The next morning, September 5, 2008, claimant awoke with sharp pain in her lower back. She had difficulty sitting up and standing up straight. Despite her symptoms, claimant reported to work. Andy Spilman, who is also one of respondent's managers, asked claimant what was wrong and she told him her back hurt from work. Claimant testified that Mr. Spilman gave her an accident report to complete, just in case she would need it.

I just told him that my back hurt, and he told me that I probably -- he asked me what it was from or whatever, and I told him, just from work, I don't know. I left work sore the day before, and now I'm just hurting.²

Later that day, claimant was confronted by Ms. Bethmann whom claimant felt was upset that claimant had prepared an accident report for a work-related accident.

Respondent referred claimant for medical treatment, which included physical therapy that was discontinued when respondent began denying the claim on the basis that claimant allegedly had reported back pain on September 1, 2008, or three days before her alleged accident. But claimant denies having back pain on September 1, 2008. She specifically denies hurting her back on a weekend camping trip leading up to September 1, 2008, and hurting her back lifting her 15-month-old child. Claimant does not deny earlier

¹ P.H. Trans. (Jan. 6, 2009) at 17, 18.

² *Id.* at 20.

muscle soreness, but she explained that had been months earlier after an exceptionally busy day.

I cannot say I never complained because months, several months before that [September 2008], Linda and I both had a very busy day, we were sore, muscle wise, in our legs, shoulders, you name it, just from the amount of boxes of shipment that came in, but no, recently, no.³

What is more, the medical records from the Family Minor Emergency Center dated September 5, 2008, note that claimant reported she had experienced pain in her lower back for two days. Those notes read, in part:

The patient states she has had pain in the middle of her lower back for two days. She cannot think of anything that could have caused the pain; however, she does a lot of lifting and bending at work. Occasionally, the pain will radiate down both legs. She thinks that it would keep her awake tonight.

. . . .

She works at Flying J Truck Stop where she places the items on shelves.⁴

And records from Occupational Health Partners, LLC, dated September 12, 2008, indicate claimant reported a history of hurting her back on September 4, 2008, moving and unloading boxes and putting stock away.⁵

Ms. Bethmann, who testified before the Judge and also by deposition, tells another story. Ms. Bethmann maintains that on September 1, 2008, claimant complained of back pain but stated she could not afford to go to the chiropractor for treatment. According to Ms. Bethmann, this conversation occurred early in the morning and transpired, as follows:

I was coming -- Tina [(claimant)] was already at work. She came in -- I think she was scheduled at [eight] o'clock because we had no vendors that day, and I was coming in to work, and I do believe she was checking in Pepsi, and I was walking in the hallway, came upstairs, did my stuff, did my fuel and came back on the floor. And I had made a comment that my back was bothering me because we just moved, and Tina turned around and told me in the hallway that her lower back had been bothering her.

³ *Id.* at 34.

⁴ *Id.*, Cl. Ex. 1.

⁵ *Id.*

. . . .

I told her to go see the chiro. That's what I do.

. . . .

She said she couldn't afford to go.⁶

Ms. Bethmann's timecard from September 1, 2008, however, indicates she did not clock in until after 1:00 p.m. But she maintains she merely forgot to clock in when she arrived at work sometime between 8:00 and 9:00 a.m. Moreover, Ms. Bethmann produced a record regarding a deposit on September 1, 2008, that was created by Mr. Spilman and verified by her. That deposit record bears a time of 11:17 a.m.

Another witness, Junior Clouse, who is respondent's facility manager at the truck stop, also testified by deposition. According to Mr. Clouse, he overheard a conversation between claimant and Ms. Bethmann on September 1, 2008, about claimant's back complaints. He believes the conversation occurred in the afternoon while claimant, Ms. Bethmann, and he were sitting outside around a picnic table. According to Mr. Clouse, Ms. Bethmann first said her back was hurting and then claimant volunteered that her back was hurting too but claimant did not have the money to see a chiropractor. Mr. Clouse testified, in pertinent part:

Q. (Mr. Collignon) What prompted that conversation?

A. (Mr. Clouse) Linda [Bethmann] said her back was hurting and then if I recall, she said that she needed to make an appointment for the chiro, and then Tina [(claimant)] said her back was hurting, too, and Linda told her, well, make an appointment, and that's when Tina said she didn't have the money to go.⁷

Finally, respondent presented the testimony and written statement of Karen Alvarado, who is a cashier and assistant accounting manager. According to Ms. Alvarado claimant told her on September 1, 2008, that her back was hurting. Ms. Alvarado maintains that she suggested that claimant see a chiropractor and claimant responded that she did not have the money. That conversation allegedly took place in the break room. Ms. Alvarado also contends she had another conversation with claimant during the morning on September 4, 2008. In that conversation, Ms. Alvarado maintains she asked

⁶ Bethmann Depo. at 8, 9.

⁷ Clouse Depo. at 12.

claimant how she was doing and claimant stated her back was no better and that she did not have the money to see a chiropractor.

Although Ms. Alvarado was asked by Ms. Bethmann to provide a written statement concerning her conversations with claimant, her written statement does not mention the September 1, 2008, conversation. What is more, the written statement indicates that claimant did not know what she had done to her back.

As indicated by Judge Moore, this is a difficult claim. The undersigned finds that claimant and the various witnesses have attempted to testify as truthfully as their memories permit. But as might be expected, there are some inconsistencies in the statements provided by respondent's witnesses. Weighing all the testimony and evidence presented, the Judge apparently concluded claimant was a credible witness.

Although there is substantial, competent evidence that would support a contrary finding, the undersigned finds it is more probably true than not that claimant injured or aggravated her back while working for respondent on September 4, 2008, as alleged. The undersigned believes claimant's memory is more accurate as to when she first began experiencing symptoms and what she was doing at the time. The undersigned is persuaded that claimant did not have back pain before September 4, 2008, and that it is more probably true than not that she developed low back symptoms while handling and setting up merchandise at work that morning.

In conclusion, the undersigned finds claimant injured her low back on September 4, 2008, while working for respondent. Moreover, the low back injury or aggravation arose out of and in the course of her employment with respondent. Consequently, the January 16, 2009, Order should be affirmed.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁸ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2008 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

WHEREFORE, the undersigned affirms the January 16, 2009, Order entered by Judge Moore.

IT IS SO ORDERED.

⁸ K.S.A. 44-534a.

Dated this ____ day of April, 2009.

KENTON D. WIRTH
BOARD MEMBER

c: Brian R. Collignon, Attorney for Claimant
Dallas L. Rakestraw, Attorney for Respondent and its Insurance Carrier
Bruce E. Moore, Administrative Law Judge